STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARGOR PARTNERS VIII - LONG BAR POINTE, LLLP,

Petitioner,

vs. Case No. 17-2028F

SUNCOAST WATERKEEPER, INC., AND JOSEPH MCCLASH,

Respondents.
_____/

FINAL ORDER

The final hearing in this case was held on August 17, 2017, by video teleconference at sites in Tallahassee and Sarasota, Florida, before Bram D.E. Canter, Administrative Law Judge for the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Edward Vogler, II, Esquire
Vogler Ashton, PLLC
2411-A Manatee Avenue West
Bradenton, Florida 34205-4948

For Respondents: Joseph McClash
711 89th Street Northwest
Bradenton, Florida 34209-9692

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner Cargor Partners VIII – Long Bar Pointe, LLLP ("Cargor") is entitled to

an award of attorney's fees pursuant to section 57.105, Florida Statutes (2017).

PRELIMINARY STATEMENT

On November 22, 2011, the Southwest Florida Water Management District ("SWFWMD") issued to Cargor a Formal Determination of Wetlands and Other Surface Waters ("FDOW"), which established the boundaries of the wetlands and surface waters on Cargor's property. Cargor sought to renew the FDOW and, on December 28, 2016, SWFWMD approved the renewal. On January 18, 2017, Respondents Suncoast Waterkeeper, Inc., and Joseph McClash ("McClash") filed a petition for hearing to challenge the renewal (DOAH Case No. 17-0655). Joseph McClash appeared on his own behalf and as the Qualified Representative of Suncoast Waterkeeper, Inc.

McClash moved twice to amend his petition for hearing, but the motions were denied, mainly because the proposed amendments addressed issues that were foreclosed from challenge because they were decided in the original FDOW. On April 5, 2017, McClash voluntarily dismissed the petition for hearing and DOAH Case No. 17-0655 was closed.

Prior to the scheduled final hearing, Cargor sent a letter to McClash, informing him that Cargor would seek its attorney's fee under section 57.105. When McClash voluntarily dismissed his petition, Cargor filed with DOAH a Motion for Sanctions under

Section 57.105, Florida Statutes. The present case was then opened to determine whether Cargor is entitled to an award of its attorney's fees under the statute.

At the final hearing Cargor presented the testimony of its attorney, Edward Vogler. Cargor Exhibits 1 through 15 were admitted into evidence. McClash testified on his own behalf. McClash Exhibits R-1 through R-24 were admitted into evidence. Following the submittal of proposed final orders, and without leave to do so, McClash filed a demonstrative exhibit he used at the final hearing, but which had not been accepted into evidence. That document is not part of the evidentiary record.

A transcript of the final hearing was not filed with DOAH. The parties submitted proposed final orders which were considered in the preparation of this Final Order.

FINDINGS OF FACT

Notice

1. On February 17, 2017, the attorney for Cargor sent Joseph McClash a letter on law firm stationary. In the first paragraph of the letter it states, "Please allow this letter to serve as notice of Cargor's intent to seek relief pursuant to Section 57.105, Florida Statutes (the "Statute") against you, individually as qualified representative, and the named Petitioner."

2. Cargor sent an email to McClash on February 28, 2017, reminding McClash that "the 57.105 deadline is March 10, 2017."

3. McClash referred to a motion for attorney's fees that he received on or about March 13, 2017, but the motion was not shown to the Administrative Law Judge nor introduced into evidence.

4. On April 5, 2017, the same day that McClash voluntarily dismissed the petition for hearing in DOAH Case No. 17-0655, Cargor filed with DOAH its motion for attorney's fees under section 57.105.

Contested Claims

5. The renewal of a FDOW is governed by section 373.421(2), Florida Statutes, which states in relevant part that the FDOW shall be renewed "as long as physical conditions on the property have not changed, other than changes which have been authorized by a permit pursuant to this part, so as to alter the boundaries of surface waters or wetlands." If the boundaries of wetlands or other surface waters have been altered without a permit, the FDOW cannot be renewed and an application for a new FDOW is required.

6. The SWFWMD reviewer explained in a letter requesting additional information from Cargor:

> Please be advised that letters of exemption do not qualify as permits issued under Part IV of chapter 373, F.S. and therefore if work has been done on the site that has altered the wetlands or other surface water

> boundaries in association with a letter of exemption, a new formal determination application will be required.

7. McClash claims Cargor did not qualify for the renewal of its FDOW because Cargor altered the boundaries of surface waters or wetlands on its property after the 2011 FDOW was issued and the some of the alterations were made pursuant to letter of exemption.

8. In its February 17, 2017, letter to McClash, Cargor set forth six grounds for Cargor's contention that McClash's petition for hearing should be withdrawn. The first three grounds were described in Cargor's letter as follows:

> A. The Formal Determination of Wetlands and Other Surface Waters, dated December 28, 2016, which is the subject of this Proceeding, does not authorize any construction activity. Consequently, no standing to challenge is or could be properly presented.
>
> B. There is no injury in fact and no one is in immediate danger of a direct injury from the issuance of the Formal Determination of Wetlands and Other Surface Waters, dated December 28, 2016, as of the date and time of filing the Petition in this Proceeding. Consequently, no standing to challenge is or could be properly presented.
>
> C. The Formal Determination of Wetlands and Other Surface Waters, dated December 28, 2016, is not a permit, license, or authorization. Consequently, no standing to challenge is or could be properly presented by an association.

These were issues of law and they were decided against Cargor in an Order dated February 28, 2017.

9. The fourth and fifth grounds described in Cargor's letter involve the central issue in the case:

> D. Changes in the land have been previously authorized by the Southwest Florida Water Management District ("SWFWMD") pursuant to existing and final permits including (i) SWFWMD ERP No. 43040157.001, dated August 6, 2014, (ii) SWFWMD CONCEPTUAL ERP No. 49040157.002, dated September 4, 2015, (iii) SWFWMD ERP No. 4304157.003, dated March 31, 2016, and (iv) SWFWMD Notice of Qualification for Permanent Farming Exemption, dated August 30, 2016. Changes in the land are authorized by the identified permits and authorizations.
>
> E. All changes in the land have occurred pursuant to the identified permits and authorizations. Allegations to the contrary are simply false and are not supported by material facts.

10. In 2015, Cargor was issued a "Conceptual ERP" permit, which describes, among other things, planned modifications to some agricultural ditches. However, the conceptual permit does not allow the commencement of construction activities.

11. On August 30, 2016, SWFWMD issued to Cargo a Permanent Farming Exemption, pursuant to section 373.406(13), which authorized Cargor to excavate three agricultural ponds in uplands. In its application for the exemption, Cargor also proposed to modify some agricultural ditches.

12. On March 31, 2017, SWFWMD issued Cargor an ERP Individual Construction Major Modification, which, among other things, authorized work in ditches. This permit was issued just before McClash's voluntary dismissal and, therefore, could not have authorized the changes on Cargor's property that McClash described in the petition for hearing.

13. Before filing his petition, McClash consulted with a wetland scientist, Clark Hull, about the merits of McClash's proposed challenge to the FDOW renewal. Hull gave McClash an affirmative response, but his input was speculative because it was based on assumptions and representations that Hull had not investigated.

14. McClash consulted with another wetland scientist, Pamela Fetterman, who conducted an "aerial, desktop review of publically available Geographic Information Systems (GIS) data." Fetterman described her initial review as an evaluation of potential undelineated wetlands and other surface waters. The Administrative Law Judge ruled that the delineation approved by the 2011 FDOW became final and could not be challenged by McClash.

15. McClash then asked Fetterman to review changes in physical conditions on the property that occurred after the FDOW was issued. Fetterman produced a report (McClash Exhibit R-6), in which she opined that the changes to physical conditions on

Cargor's property "have a high likelihood of affecting the previously delineated landward extent of wetlands and other surface waters." She stated further:

> [C]hanges in physical conditions of the property took place prior to issuance of the [FDOW renewal] as purported "exempt agricultural activities", and include ditch dredging alterations to delineated other surface waters. . . . A Permanent Farming Request for Exemption Confirmation letter was applied for on August 23, 2016 for construction of these ponds and modification of existing ditches, some of which were determined to be jurisdictional other surface waters by the subsequently re-issued [FDOW].

16. At the final hearing on fees, neither McClash nor Cargor made clear to the Administrative Law Judge: (1) the physical changes to the property that were alleged to be authorized by permit, (2) the physical changes that were alleged to be authorized by exemption, or (3) any physical changes that were alleged to be unauthorized.

17. The sixth ground described in Cargor's letter is as follows:

> F. The picture attached to the Petition as set forth in Paragraph 9, and the stop work allegation set forth in Paragraph 10 are irrelevant and have no factual relationship to any issue in the proceeding. Since any changes in the land have occurred pursuant to identified permits and authorizations, the allegations are simply false and/or intentionally misleading.

It is not a basis for an award of attorney's fees under section 57.105 that an irrelevant photograph was included in a petition for hearing. Moreover, the aerial photograph in McClash's petition was relevant in this case because it showed the physical conditions of Cargor's property.

18. In the petition, McClash states that Manatee County issued a stop work order on November 16, 2016, for construction activities commenced on Cargor's property without a County-approved erosion control plan. This allegation also pertained to physical changes to the property. All evidence about physical changes was relevant in determining whether Cargor was entitled to renewal of the FDOW.

Fees

19. Cargor claims fees based on 48.4 hours of attorney time (Edward Vogler) at an hourly rate of $410, and 3.6 hours of attorney time (Kimberly Ashton) at an hourly rate of $385, for a total of $21,230.00.

20. The fees Cargor is seeking include the hours spent on legal issues raised by Cargor that were rejected by the Administrative Law Judge. These fees amount to at least $1,025. See Cargor Exhibit 1, Invoice entries for February 20, 2017.

21. Cargor's attorney testified that the fees are reasonable. Cargor did not call an expert witness to corroborate

the reasonableness of the hourly rate and the reasonableness of the hours expended.

CONCLUSIONS OF LAW

Jurisdiction

22. Section 57.105(5) provides that in administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to the prevailing party to be paid in equal amounts by the losing party and the losing party's attorney in the manner and upon the basis set forth in subsections (1) through (4) of the statute.

23. Section 57.105(1) states that a reasonable attorney's fee shall be paid when the court finds that the losing party knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the existing law to those material facts.

Notice

24. An action for fees under section 57.105 is initiated by service of a motion upon the opposing party. Section 57.105(4) provides that the motion "may not" be filed with the court unless "within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not

withdrawn or appropriately corrected." This is commonly known as the "safe harbor" provision.

25. In Anchor Towing, Inc. v. Florida Department of Transportation, 10 So. 3d 670 (Fla. 3d DCA 2009), the court strictly construed the requirement of section 57.105 for a "motion" and denied fees when notice was provided by a letter. The court stated that the statute must be strictly construed because it is in derogation of the common law. See also Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014)(substantial compliance with section 57.105 is not sufficient); Kenniasty v. Bionetics Corp., 10 So. 3d 1183 (Fla. 5th DCA 2009)(The word "motion" in the statute means "motion", and "notice by letter does not meet the restrictive terms of the statute.").

26. Because the record does not show that Cargor met the strict notice requirements of section 57.105, Cargor did not establish its entitlement to an award of its attorney's fees.

Burden and Standard of Proof

27. Cargor has the burden to prove by a preponderance of the evidence that McClash knew or should have known that his claims were not supported by the material facts. "Supported by the material facts" means the party possesses admissible evidence sufficient to establish the claim if accepted by the finder of fact. Albritton v. Ferrera, 913 So. 2d 5, 7 (Fla. 1st DCA 2005). The test under section 57.105 is not whether the losing party's

evidence was more persuasive to the factfinder. If that were so, all losing parties would be liable under section 57.105 for attorney's fees. The proper test is whether the losing party had admissible evidence that would have established the claim if the evidence had persuaded the factfinder. Id.

Material Facts Supporting the Claim

28. Cargor did not meet its burden of proof. McClash had admissible evidence (the Fetterman report) to support his claim that Cargor had made physical changes that altered the boundaries of surface waters (ditches), and the changes were not authorized by permit, but, instead, were authorized by the Permanent Farming Exemption. If DOAH Case No. 17-0655 had gone to final hearing, the Administrative Law Judge would have admitted Fetterman's testimony and report.

29. McClash's evidence does not have to be more persuasive than Cargor's evidence regarding the disputed factual issue of whether the boundaries of surface waters on the property had been altered by unpermitted activities. It is enough that McClash's evidence was admissible and, if it had been accepted, would have established McClash's claim that Cargor was ineligible for the renewal of its FDOW.

30. The purpose of section 57.105 is to discourage baseless claims. Vasquez v. Provincial South, Inc., 795 So. 2d 216, 218 (Fla. 4th DCA 2001). Section 57.105 should be applied with

restraint so as not to risk chilling access to the courts. Minto PBLH, LLC v. 1000 Friends of Fla., Inc., No. 4D16-4218, slip op. at 3 (Fla. 4th DCA Oct. 18, 2017).

31. An award of fees is not justified just because the party seeking fees obtained a dismissal. See Read v. Taylor, 832 So. 2d 219, 222 (Fla. 4th DCA 2002). Whether fees should be awarded in a case that was dismissed depends on whether the underlying cause of action is so clearly and obviously lacking as to be untenable. Pappalardo v. Richfield Hospitality Servs., Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001).

32. In these proceedings, McClash's pleadings and actions do not show bad intent or an untenable claim. In fact, it was never established that McClash was wrong.

Expert Witness

33. Florida courts require expert testimony on the reasonableness of attorney's fees. In Island Hopper, Ltd. v. Keith, 820 So. 2d 967 (Fla. 4th DCA 2002), the Fourth District Court of Appeal questioned the rationale for requiring an expert witness on fees. However, just a year later, the court clarified that, "agreeable or not, the existing case law requires presentation of corroborating testimony of the reasonableness of attorney's fees." Rakusin v. Chritiansen and Jacknin, 863 So. 2d 442, 443 (Fla. 4th DCA 2003). The Second District Court of Appeals, wherein this case arises, requires an expert witness to

corroborate the reasonableness of attorney's fees. See Snow v. Harlan Bakeries, Inc., 932 So. 2d 411, 412 (Fla. 2d DCA 2010).

34. Because Cargor did not present an expert witness to corroborate the reasonableness of the hourly rate charged by its attorneys and the number of hours expended, Cargor did not prove that its attorney's fees are reasonable.

DISPOSITION

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that the Motion for Sanctions under Section 57.105, Florida Statutes, is DENIED.

DONE AND ORDERED this 20th day of October, 2017, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of October, 2017.

COPIES FURNISHED:

Edward Vogler, II, Esquire
Vogler Ashton, PLLC
2411-A Manatee Avenue West
Bradenton, Florida 34205-4948
(eServed)

Joseph McClash
711 89th Street Northwest
Bradenton, Florida 34209-9692
(eServed)

Christopher Tumminia, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.